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# Teaching Moral Analysis in Law School

*Paul G. Haskell\**

## INTRODUCTION

The purpose of this Article is to suggest the importance and feasibility of applying moral principles to legal problems in law school instruction. My legal education at Harvard some forty years ago did not include the moral analysis of law, and there is little of it in legal education today. Indeed, it is safe to say that from Langdell to the present, legal education has never seriously attempted to incorporate moral principles into instruction. There are at least two reasons for this. One reason is that some legal educators do not believe morality warrants serious consideration because it is thought to be indeterminate, relative, subjective or religious, or a construct to justify private interests. The other reason is that those legal educators who believe that morality has value do not consider themselves sufficiently educated in the subject to include it in their instruction. This Article is not likely to convince the unconvinced of the value of morality. I am more sanguine, however, about the possibility of demystifying morality for those who already acknowledge its value. There is difficulty in dealing with the concept, but the difficulty is not insurmountable.

I received a research leave for the 1990 spring semester to do reading in the area of moral philosophy. The concept of morality has intrigued me for many years, but I have always felt inadequately informed about its origins, what its content is, and how one deals with the recurring conflicts of moral obligations. After several months of reading, I have acquired a rudimentary understanding of its content and its method of resolving conflicts. The source of the sense of moral "right" and "wrong," of moral duty, which most people possess in Western culture, and probably in most cultures, remains a mystery and need not be resolved for present purposes. It suffices that the sense of "right" and "wrong," of moral duty, is a psychological fact. Aesthetic appreciation is a mystery of a similar kind. The sense of the moral and

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the sense of the aesthetic have in common that they make life worth living and are unintelligible to the logical positivist.

### I. THE JURISPRUDENCE OF THE LAW SCHOOL CLASSROOM

The legal instruction to which I was subjected took essentially the following form. The facts of a conflict were examined and a remedial resolution or the absence thereof would be determined and expressed in a generalization applicable to all conflicts of that specific nature. Next, the same facts, modified in some respect, would be considered, followed by a determination of whether the same resolution was appropriate, or whether a different resolution was appropriate stated in the form of a somewhat different generalization. These resolutions, these legal conclusions, would be justified in terms of "logic," "fairness," "justice," "common sense," or "public policy." Fairness and justice are moral terms, but usually no effort was made to probe their meaning, or even to explain that it was morality that was involved. Public policy connotes social benefit or utility; sometimes this would be examined in more detail. Common sense denotes self-evidence. Logic in this context could be deductive (analogical) or inductive. Forty years ago legal realism was not in vogue at Harvard, and it is my impression that this was generally true in legal education, Yale being clearly an exception. That is to say, discretion and choice in the determination of facts and applicable law were not discussed in any jurisprudential sense. The jurisprudence seemed to be conceptualism (formalism) tempered with gradual socioeconomic change and homespun morality. Classroom analysis primarily focused on the merits of legal conclusions; I do not recall that the instruction focused significantly on the advocate's use of the law. This description is obviously a grossly simplified statement of how law was taught many years ago, but it captures the essence of legal education.

Legal education has changed in several respects. Legal realism, *i.e.*, judicial discretion and choice, is standard fare, although the extreme realist position is probably not as broadly accepted today as it was a couple of decades ago. Some professors feel sufficiently comfortable with economic efficiency analysis to use it where it fits, either descriptively or prescriptively. Clearly, moral analysis is absent today as it was forty years ago, except insofar as the words "fair" and "just" are used to support results.

Today, law students are frequently taught that the practitioner can manipulate facts and legal rules in the interest of the

client's objective, and that the court can consciously or subconsciously manipulate facts and legal rules in the interest of the judge's social, economic, or other preferences. Indeed, law teachers deem it desirable for the courts to use their discretionary powers to maximize economic efficiency, maximize economic freedom, minimize economic inequality, protect the environment, assist the poor, compensate victims of discrimination, and so on, in accordance with the instructor's social concerns and preferences. The law is perceived today, at least among many academics, as a more malleable institution of social control than it was several decades ago. This change in the perception of law has great moral implications, but it is seldom, if ever, analyzed in those terms.

In a provocative article, Professor Roger Cramton of Cornell deplored the "ordinary religion of the American law school classroom," which consists of "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place."<sup>1</sup> Law teachers stress "cognitive rationality along with 'hard' facts and 'cold' logic and 'concrete' realities. Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable—these soft and mushy domains of the 'tender minded' are off limits . . . ."<sup>2</sup>

Cramton described the models of the "hired gun" and the "social engineer" which are presented to law students:

The former is the skilled craftsman of the discrete controversy, while the latter is the technician and applied scientist of the use of legal tools for broader social change. Both are technicians who are trained in the dispassionate use of legal skills for the instrumental purposes of those they serve. The hired gun gets his goals from the client he serves; the social engineer either prefabricates his own goals or gets them from the interests he serves. Involvement in the messy reality of human feelings is to be avoided by both in favor of an analytical detachment that gives preeminence to a rational calculation of alternative strategies of aggressive action.<sup>3</sup>

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1 Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

2 *Id.* at 250.

3 *Id.* at 251.

Cramton asked: "Are law students encouraged to be indifferent to character, insensitive to human problems, lacking in human concerns? Are they educated in accordance with an unreal professional model of detachment, non-involvement, and insensitivity?"<sup>4</sup> Cramton's comments are aimed at a good deal more than the absence of moral analysis of the law or the lawyer's role, but that is unquestionably one of his concerns.

Although realism and economic analysis have become the new jurisprudential elements of legal instruction in recent decades, my impression is that in many classrooms law continues to be taught, as in decades past, substantially in an objective, conceptualistic fashion, tempered with socioeconomic commentary. Many faculty do not understand economic efficiency analysis, or to the extent that they do, they are unconvinced by it. Some faculty are not convinced of the truth of the realist premise of easy manipulability of law. In classrooms where there has been change, and in classrooms where there has not, moral analysis does not play a significant role.

## II. WHY MORAL ANALYSIS OF LEGAL RESULTS IS IMPORTANT

I wish to make it clear that there is one issue in the relationship of morality to law with which I am not concerned. I am uninterested in the tired question of whether a grossly immoral rule emanating from the sovereign is truly a law. I accept that it is, and that a morally responsible person may or must decline to obey it. I fail to understand why it is important what label is placed on the sovereign's immoral act so long as it is understood that there are values which transcend obedience to the sovereign.

There are several reasons for subjecting legal results to moral analysis. First of all, moral analysis assists in the explanation and prediction of legal conclusions. The law is eclectic; there is no unitary theory of law. Conceptualism, realism, criticalism, economic analysis, behavioral analysis, gender analysis, moral analysis, among other theories, all play roles in the development of law. Law is made by people, and people are multi-faceted. There is a naive streak among academics which seems to require a unitary explanation of legal phenomena. If one factor explains all, then truth is at hand. If many factors are involved, then there is indeterminacy and the truth is elusive. The academic feels defeated by

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4 *Id.* at 261.

the inability to explain all. She is then no better than the nonacademic who also cannot explain all (and does not try to).

Morality plays a role; I suspect that it plays a greater role than most legal academics give it credit for. Even positivists such as Holmes<sup>5</sup> and Hart<sup>6</sup> recognized that law is rooted in morality. Our law is made by individuals conditioned by the Western moral tradition, which draws upon Judeo-Christian values. Law as the principal means of governing relationships inevitably has substantial moral content.

Another reason for moral analysis is that the viability of our system of freedom under law is ultimately dependent upon the belief of the governed that the law, however flawed, is fundamentally fair and right. Freedom under law requires the consent of the governed that they will not violate the property or person of others, that they will respect the intellectual and spiritual freedom of others, that they will honor their obligations, and that they will abide by the rule of the majority so long as it does not deny these rights and duties. It is consent, not the force of the state, that makes freedom possible. That consent derives from a belief that the system is fundamentally fair and right, whatever its shortcomings. If the moral basis for consent becomes eroded, freedom under law is jeopardized. If the system is no longer perceived as moral, an intrusive system of governance is likely to replace it.

Richard John Neuhaus, a theologian who has written extensively on the relationship of morality and law, expressed this idea as follows:

Whatever else law may be, it is a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to . . . the larger universe of moral discourse that helps shape human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force.<sup>7</sup>

Another reason for moral analysis of law is concern for the character of the potential lawyers in training. If the moral content of law is de-emphasized in legal education, the student may become less conscious of moral constraints in her practice. The

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5 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). This also appears in O. HOLMES, *COLLECTED LEGAL PAPERS* 167, 170 (1920).

6 H. HART, *LAW, LIBERTY, AND MORALITY* 1 (1963).

7 Neuhaus, *Law and the Rightness of Things*, 14 VAL. U.L. REV. 1, 8 (1979).

moral content of law and the morality of law practice are separate subjects, but it stands to reason that each has an affect upon the other. The lawyer's awareness of the moral content of law may enhance the awareness of the moral constraints upon the lawyer. If one considers that one is engaged in a moral enterprise, one may be more likely to conduct oneself in a moral manner.<sup>8</sup>

### III. THE BASIC COMPONENTS OF MORALITY

The British moral philosopher, G.F. Warnock, in his thoughtful book, *The Object of Morality*, describes the role of morality:

[T]he general object of moral evaluation must be to contribute in some respects, by way of the actions of rational beings, to the amelioration of the human predicament—that is, of the conditions in which *these* rational beings, humans, actually find themselves. Accordingly, I take it to be necessary to understanding in this case to consider, first, what it is in the human predicament that calls for amelioration, and second, what might reasonably be suggested (to put it guardedly) as the specific contribution of 'morality' to such amelioration . . . .

. . . .

. . . [T]he 'general object' of morality, appreciation of which may enable us to understand the basis of moral evaluation, is to contribute to betterment—or non-deterioration—of the human predicament, primarily and essentially by seeking to countervail 'limited sympathies' and their potentially most damaging effects. It is the proper business of morality, and the general object of moral evaluation, not of course to add to our available resources, nor—directly anyway—to our knowledge of how to make advantageous use of them, nor—again, not directly—to make us more rational in the judicious pursuit of our interests and ends; its proper business is to expand our sympathies, or, better, to reduce the liability to damage inherent in their natural tendency to be narrowly restricted.<sup>9</sup>

Warnock states that our "limited sympathies" for others cause us to harm, deceive, discriminate against, and avoid helping others. He then posits the basic moral principles of nonmaleficence, beneficence, fairness, and nondeception. Nonmaleficence is the avoidance of doing harm; beneficence is the doing of good; fairness is nondiscrimination, the doing of justice; nondeception is

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8 See Bennett, *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U.L. REV. 45 (1986).

9 G. WARNOCK, *THE OBJECT OF MORALITY* 16, 26 (1971).

the avoidance of lying, breaking promises, and the like.<sup>10</sup>

The prominent British philosopher, W.D. Ross, in his noted book, *The Right and the Good*, enumerated several basic moral duties in the following paraphrased form: (1) Duty of fidelity (keeping promises and not telling lies); (2) duty of beneficence (doing good for others); (3) duty of nonmaleficence (not doing harm to others); (4) duty of justice (avoiding the distribution of pleasure or happiness which is not in accordance with the merit of the person benefitted or deprived); (5) duty to oneself to improve one's virtue or intelligence; (6) duty of reparation (compensating for wrongful acts); (7) duty of gratitude for services done by others.<sup>11</sup>

The first four correspond to the principles Warnock described. The moral duty to oneself is recognized by some philosophers and not by others.<sup>12</sup> The duties of reparation and gratitude are not usually included in the category of basic moral duties. Reparation seems to be subsumed under nonmaleficence; gratitude seems to be a state of mind rather than a duty of conduct.

The American moral philosopher, William K. Frankena, also recognizes the basic moral duties of doing good for others, not inflicting harm upon others, being truthful, keeping promises, and doing justice (treating individuals in similar circumstances in a similar manner).<sup>13</sup> Frankena, however, equivocates on the existence of a duty to oneself to develop one's capacities and not to harm oneself.<sup>14</sup>

The American philosopher, John Rawls, in his lengthy and difficult book, *A Theory of Justice*, speaks of the duty to help others, the duty to avoid doing harm, and the duty of fidelity, which is concerned with keeping promises.<sup>15</sup> Although it is not stated explicitly, presumably lying would constitute a form of harm or a breach of fidelity. Rawls' tome is, of course, concerned primarily with justice, which he defines generally as fairness, and in particular he defines in two parts as follows: (1) Each person is to have

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10 *Id.* at 80-87.

11 W. ROSS, *THE RIGHT AND THE GOOD* 21 (1930).

12 See A. DONAGAN, *THE THEORY OF MORALITY* 76 (1977).

13 See W. FRANKENA, *ETHICS* 43-55 (2d. ed. 1973).

14 *Id.* at 54-55. Frankena posits that although it is logical that moral principles should apply to oneself as well as to others, it may not be necessary to think in terms of duty to oneself because individuals naturally care for and protect themselves.

15 J. RAWLS, *A THEORY OF JUSTICE* 113, 346 (1971).



an equal right to the most extensive basic liberty which is compatible with a similar liberty for others; and (2) social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, and (b) attached to positions and offices open to all.<sup>16</sup>

There is clearly a consensus among modern moral philosophers concerning the fundamental components of morality: avoiding harm, helping others, keeping promises, not lying, and giving each what he is due (justice).<sup>17</sup>

At the center of the concept of morality is the dignity, the value, the freedom, the self-determination, of the human being. The human being is not to be harmed or lied to or discriminated against, and the promises that are made to a human being are to be kept. If these duties are performed by others including the state, the individual will be free and self-determining and have dignity. If morality imposes such duties, it follows that the individual has the moral right to freedom, self-determination, and dignity. Morality is the recognition of the intrinsic worth of the human being.

Where does the notion of the intrinsic worth of the human being come from? It cannot be demonstrated empirically or logically that you or I are intrinsically valuable. Hitler, Stalin, and Pol Pot didn't believe that each person was intrinsically valuable. Can it be proved that they were wrong? The moral philosophers have no convincing answer. Sometimes it is said that man has intrinsic value because he is rational.<sup>18</sup> Why is this so? Reason enables man to dominate the earth and contemplate his existence, but how does that establish his intrinsic worth? Can values be derived from fact? To the Judeo-Christian theist, man has worth because God said so—but that is faith, not reason. The secular moral philosopher also accepts man's intrinsic value on faith—secular faith. This is, of course, my inference, not the explicit position of the secular philosophers.<sup>19</sup>

It should be noted that the utilitarian moralist does not be-

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16 *Id.* at 83.

17 See A. DONAGAN, *supra* note 12, at 76-100; B. GERT, *MORALITY* 96-159 (1988); A. QUINTON, *UTILITARIAN ETHICS* 69 (1973); P. STRAWSON, *FREEDOM AND RESENTMENT* 38 (1974). See also S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 76 (1978).

18 See discussion in A. DONAGAN, *supra* note 12, at 63-65, 71-82, 228-34.

19 It has been said that a major achievement of the Enlightenment was to express religious positions in secular terms. Johnson, *Do You Sincerely Want To Be Radical?*, 36 *STAN. L. REV.* 247, 289 (1984).

lieve in the intrinsic worth of the human being. Morality to the utilitarian consists of achieving the greatest possible balance of pleasure or happiness over pain, or the greatest net utility for society, however one defines pleasure, happiness, pain, or utility. It is arithmetical, and in its calculus the interests (or lives) of a few may be sacrificed for the benefit of a greater number. The individual human being is not a unique moral consideration.

Most modern moral philosophers are not utilitarian in the strict sense. Most accept the intrinsic value of the human being. The moral constraints enumerated above are not accepted strictly on the basis that they produce the greatest net utility in any given situation. While the constraints are socially useful, their significance transcends the utilitarian calculus. The utilitarian would find lying acceptable if the benefit from the lie was greater than the damage produced by the lie. The nonutilitarian moralist would also permit lying in certain circumstances, but the justification would require greater significance than the arithmetical balance of social utility. The duty to tell the truth would have weight in the decisional scales which would not be limited to its utility. John Rawls is not a utilitarian, but he emphasized that consequences are important: "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."<sup>20</sup>

What do the philosophers consider to be the basis for the moral duties? Reference has been made to respect for man as a rational being. W.D. Ross, an intuitionist, asserted that the duties are self-evident.<sup>21</sup> Most, however, do not explain precisely what the basis is. Clearly they are all concerned with the social utility of the duties, although most are not utilitarian in the pure sense. They recognize that the moral duties have a force which is more than a matter of utility, but the element other than utility is not defined. That element seems to be intuitional in some sense of the word. Rawls describes the situation:

We sometimes forget that the great utilitarians, Hume and Adam Smith, Bentham and Mill, were social theorists and economists of the first rank; and the moral doctrine they worked out was framed to meet the need of their wider interests and to fit into a comprehensive scheme. Those who criticized them often did so on a much narrower front. They

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20 J. RAWLS, *supra* note 15, at 30.

21 W. ROSS, *supra* note 11, at 29.

pointed out the obscurities of the principles of utility and noted the apparent incongruities between many of its implications and our moral sentiments. But they failed, I believe, to construct a workable and systematic moral conception to oppose it. The outcome is that we often seem forced to choose between utilitarianism and intuitionism. Most likely we finally settle upon a variant of the utility principle circumscribed and restricted in certain ad hoc ways by intuitionistic constraints.<sup>22</sup>

The basic moral duties have been set forth in very general form, and at this point some elaboration is called for. Harm is any injury to or interference with the freedom, person, property, or interests of an individual which is not justified in the circumstances. It is morally permissible to injure or even kill another in self-defense. It is morally permissible for the state to restrict one's use of land to further a societal objective. On the other hand, except in unusual circumstances, it is not morally permissible to perform surgery upon a competent adult without first obtaining her consent and informing her of the alternatives and the risks.

One has a duty to do good to others "provided that one can do so without excessive risk or loss to oneself."<sup>23</sup> This qualification follows from the fact that one has a duty to care for oneself. I am as morally valuable as you. I am therefore not obligated to deprive myself in order to provide for you, although I have a duty to provide for you if it does not result in a substantial deprivation to myself. Doing good to others in excess of such an obligation is, of course, considered to be a highly moral act, but it is not a moral duty; such saintly conduct is referred to as supererogatory.<sup>24</sup>

The duty of truthfulness includes more than intentional misrepresentation. The duty forbids deception. Silence or conduct intended to deceive violates the duty. There may be circumstances, however, in which misrepresentation is morally permissible, or even obligatory. If A asks me where B is, and I have good reason to believe that A intends to harm B physically, my untruthful answer to A is morally permissible or obligatory. There are circumstances in which a physician may be justified in lying about a discouraging prognosis to a psychologically fragile patient, or a parent may be justified in lying to a young child in order to reas-

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22 J. RAWLS, *supra* note 15, at vii-viii.

23 *Id.* at 114.

24 See A. DONAGAN, *supra* note 12, at 86.

sure the child. Similar reasoning may justify the failure to keep a promise.

The duty of justice, *i.e.*, giving each what he is entitled to, and treating individuals in similar circumstances in a similar manner, is a vast subject. It involves the need to justify differential treatment of individuals, whether it is the distribution of goods, jobs, education, or medical services that is involved, or the regulation of conduct. The formal principles, as just stated, are simple enough. The substance, however, can be complex and varies with societal values. The classical liberal ideal of equality of opportunity and distribution based on performance without significant state involvement is different from the welfare-state emphasis upon distribution based on need. Rawls' position is that inequalities are justified only if they benefit all. Criminal justice, of course, calls for equality of treatment under the criminal law; what is also important from the standpoint of justice is the substance of the criminal laws. That is to say, injustice can consist of immoral laws, *i.e.*, laws which proscribe certain conduct without adequate justification, as well as disparate administration of the laws.

#### IV. MORAL CONFLICTS

It is one thing to state the generally accepted moral principles; it is another to determine what constitutes moral conduct when the principles are in conflict in a specific situation. Several examples of conflict were briefly described at the conclusion of Part III. It will become evident that in conflict situations the determination of moral conduct is a blend of intuition and a concern for consequences. Contemporary moral philosophers generally do not accept the moral duties as absolutes; the moral duties are to be fulfilled presumptively, but circumstances may justify their breach.<sup>25</sup>

Let us first examine a problem concerning deception. Professor is a law professor. Student is a third-year law student in the

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25 See W. FRANKENA, *supra* note 13, at 55-56; B. GERT, *supra* note 17, at 271-75, 282-303; R. HARE, *MORAL THINKING* 25-64 (1981); D. LYONS, *ETHICS AND THE RULE OF LAW* 81, 84, 106 (1984); W. ROSS, *supra* note 11, at 28-42; J. WALLACE, *MORAL RELEVANCE AND MORAL CONFLICT* 78-95 (1988). See generally S. BOK, *supra* note 17. For essays on moral conflicts in the bioethics area, see *BIOETHICS* (T. Shannon ed. 1987); *ETHICAL ISSUES IN MODERN MEDICINE* (J. Arras & N. Rhoden 3d ed. 1989) [hereinafter *ETHICAL ISSUES*]. For an analysis of the morality of the criminal sanction and the balancing process involved, see J. FEINBERG, *HARM TO OTHERS* (1984).

process of interviewing for a job. He is very personable and interviews well. Student was in two of Professor's courses and received a grade of "B" in both. Student's average places him in the top quarter of his class. He was frequently absent from Professor's classes and was unprepared on the several occasions that Professor called on him. Professor also heard from a colleague that Student handed in a seminar paper six weeks late without adequate justification. Professor's impression of Student was that he had not been responsible in the performance of his academic duties, although he was probably very competent.

Professor received a phone call from Lawyer, a former student whom she had not seen for ten years and whom she knew well when Lawyer was a student. Lawyer said that he was chairperson of his firm's hiring committee and that his firm (a prominent one in a large city) had interviewed Student and was very favorably impressed with his academic record and with him as a person. Lawyer asked if Professor knew Student, and if so, what her assessment of him was. Professor knew that if she accurately stated her assessment of Student, however she might qualify it, Student's chances of receiving an offer would be jeopardized. Professor told Lawyer that Student was in two of her courses in which he had received a good grade, but beyond that she had no other information. Was Professor's response morally justifiable?

The issue, of course, is whether Professor's failure to disclose what she knew, a form of deception, was justified. She failed to disclose in order to help Student, or at least not to harm him. One of the several consequences of lying is that the listener may be harmed by his reliance upon what he has been told. That consequence may apply here. Professor felt, however, that her impression of Student's irresponsibility may have been based upon inadequate experience with Student. Professor also felt that Student might conduct himself responsibly in a job despite his irresponsibility in the law school setting. Professor could have avoided misrepresentation by stating that she preferred not to comment on Student; this, of course, would have damaging implications.

If Professor's impression of irresponsibility is accurate, Lawyer's firm may be harmed by Professor's misrepresentation. If, on the other hand, Student's conduct was due to immaturity or his attitude toward law school, and his performance at the firm turns out to be satisfactory, the misrepresentation would not harm Student or the firm but rather would benefit both.

The issue is whether the lie is justified by the good that it may produce or the harm that it may avoid. There is a strong presumption that deception is impermissible. It seems to me that the purported justification is inadequate. Certainly, a contrary conclusion is not unreasonable.

Let us examine a problem dealing with promises. Jim was a bright, young systems analyst employed by Corporation, a large national enterprise. Corporation offered to pay Jim's tuition and living expenses at a leading graduate school of business for the two years required for an M.B.A. In exchange, Jim would agree to remain in a management position with Corporation for five years after he received his degree. Jim accepted the offer, signed the contract, and started his business school education. During his first year he met, fell in love with and married Mary, a young law professor at a nearby law school, an institution of middle-level status. Within weeks of the marriage Mary received an offer to visit during the next academic year at one of the leading law schools in the nation located 500 miles away. She accepted the offer. During the next academic year they had a commuter marriage, seeing each other most weekends. In the late fall of that year she was offered a tenure-track position at the leading law school, which she accepted. Also during that year she became pregnant, despite their precautions.

Jim had insisted that Mary not accept the tenure-track position, but she did anyway. Mary then insisted that Jim move to her location, find a job there, and help care for the child after it arrived. Jim protested that he was committed to Corporation which had no offices near her location. Mary responded that her job was a once-in-a-lifetime career opportunity, Corporation would survive without him, and that he owed it to the child to move. Mary was adamant about the matter. Corporation told Jim that he was honor-bound to comply with the contract, but that it would not pursue any legal action. Jim told Corporation that he would repay Corporation over time for the cost of his education. Corporation responded that it was the services of bright, young people that it needed.

Jim left Corporation, joined Mary, found a job there, and shared the responsibility of caring for the child. Was Jim's conduct morally acceptable?

Jim broke his promise to Corporation, but was this decision justified by his duties to Mary and the child? Jim's duty to the child is not a case of an altruistic doing of good. Jim came under

obligation to the child because he fathered the child. Jim's relationship with Mary implied an undertaking to be responsible to any child resulting from their relationship. This obligation seems to fall within the category of fidelity. Whatever label is attached to the duty, it clearly exists. Mary's obstinacy made it impossible for him to care for the child and stay with Corporation.

Jim also had a duty to Mary to maintain the marriage. The fact that Mary placed her career above Jim's promise to Corporation does not necessarily relieve Jim of his duty to keep the marriage intact. This duty also seems to come under the heading of fidelity. There is also the pragmatic consideration that Mary's career opportunity is critical to her, whereas Jim's employment by Corporation is of minor significance to Corporation when viewed in isolation. There is, of course, the damage that is done to the relationship of trust between Corporation and employees like Jim when an event of this nature occurs.

It is my conclusion that despite the strong presumption that promises should be kept, Jim's conduct is justifiable. The moral duty to Corporation is outweighed by Jim's moral duty to the child and to maintain the marriage. Once again, others may disagree. Morality consists of values; values are not empirically or logically provable.

The controversial question of racial affirmative action presents a moral conflict concerning justice. In order to maintain a certain percentage of black middle-management employees, Employer has a policy of preferring black applicants over white applicants whose credentials, by customary standards of management, are superior to those of the black applicants, whenever that is necessary. It is assumed that this practice is not illegal under state or federal law. On its face, this is unjust to the white applicant because she is being treated differently from the black applicant on the basis of a factor which has no relationship to the qualifications for the job. One justification for the use of race as a criterion is that given this country's history of slavery, segregation, and discrimination, American society has a duty to compensate the black minority by accelerating its participation in the nation's economy. There is also the argument that discrimination against blacks in employment will continue unless goals and quotas for them are used. In addition, blacks in management positions serve as role models for young blacks who might not otherwise consider that there was opportunity for them in those positions, in view of the history of discrimination.

In addition to the injustice to the white applicant, there are other arguments against preferential hiring of blacks with lesser credentials. One argument is that this practice causes many in society of both races to assume that blacks generally are underqualified for their jobs; this attitude is damaging to blacks who have obtained their positions independently of affirmative action considerations. There is also the argument that preferential hiring policies place blacks in positions in which they may perform less well than their white counterparts, thereby perpetuating racially prejudiced attitudes. Finally, there is the contention that social divisiveness results from disparate treatment based on race.

Obviously, reasonable people may differ on whether preferential hiring is morally justifiable. It is a close call, but it is my conclusion that the strong presumption against the injustice of using a racial criterion is not overcome by the arguments in support of preferential hiring.

Finally, let us examine briefly the duty to help others so long as the burden upon or risk to oneself is not excessive. One has a duty to make reasonable contributions to responsibly operated charities, but one is not required to give his life savings to the starving people of Ethiopia. One has a duty to help a sick neighbor by taking him to the doctor, preparing meals, and the like, but one is not obligated to give up one's job to care for him on a daily basis. If one does give up all to help others, it is highly moral conduct, but it is not considered obligatory.

Let us look at the problem of rescue in the context of doing good. Stan is twenty-five, single, and a former member of his college swimming team. He is walking along a deserted beach on the Outer Banks of North Carolina where the surf is menacing and riptides are common. Stan has never had any life-saving instruction. Suddenly he sees a person struggling in the surf 150 feet from shore. The swimmer, a woman, raises an arm when she can to signal that she is in trouble, and she appears to be caught in a riptide pulling her away from shore. She is being slammed by each wave and disappears under the surface for a moment and then reappears. Stan's reaction is that his chance of saving the woman if he attempts it are not better than fifty percent, and the risk of his drowning in the process would not be insubstantial. Stan does not attempt to rescue the woman who shortly thereafter drowns in the surf. It seems that Stan has not violated the moral duty to do good. He was entitled to care for himself which justified the failure to help another.



## V. MORAL ANALYSIS OF LAW

Let us first examine a case in which Physician is asked by the suffering Patient to assist in causing his immediate painless death, a form of euthanasia.<sup>26</sup> Patient, at the age of seventy, had been operated on for cancer. Following the operation he received radiation and chemotherapy. The cancer has reappeared, and he continues to undergo the same treatment. He is in constant discomfort and frequent pain. Physician has advised him that the treatment may arrest the cancer, but the odds are strongly against it. There is a substantial likelihood that he will die within a year. Patient was a newspaper columnist until the onset of the cancer; he had to give up his work because he could no longer produce his column regularly. He has tried to write a book on a political subject, but has made little progress because of his illness. Patient does not wish to go on living. His wife is sympathetic with his position, as are his children. Patient asks Physician if she will assist him to end his life immediately without pain. Suicide is not a crime in the state, but aiding a person to end his life would be a criminal act.

Let us first examine the morality of Patient's action. This involves a conflict between the moral value of autonomy on the one hand, and the duty to self on the other. Obviously, one's autonomy does not entitle one to violate the moral rights of another. By analogy, one's autonomy should not entitle one to violate one's duty to oneself. The duty to self requires that one develop one's capacities and preserve oneself. The issue is whether the duty to self is outweighed by the discomfort, pain, inability to be productive, and the imminence of death. It is reasonable to conclude that terminating one's life in this circumstance is a moral exercise of one's autonomy, although, of course, some may disagree.

Assuming Patient's suicide is morally permissible, is Physician morally permitted to assist him by providing a lethal injection or other painless means? If one disregards state law, it seems that assisting Patient to do what he is morally permitted to do is itself morally permissible. However, state law has a role to play in the determination of the morality of Physician's conduct.

Why is euthanasia a crime? The reason probably is rooted in

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26 See ETHICAL ISSUES, *supra* note 25, at 220-50, for essays on euthanasia.

the Western religious tradition which considers that only God is permitted to take life. There are, of course, exceptions in this tradition, such as self-defense, just war, and capital punishment. Taking life in this circumstance is not an exception. There is also the functional explanation that it is better to prohibit absolutely the taking of life in this context than to open the door to discretion that may be abused or mistaken. Better to ban justifiable euthanasia than to run the risk that some lives will be taken that should not have been. The law as applied to euthanasia can be defended as moral even though it may function to block morally permissible action in individual instances.

If Physician assists Patient to terminate his life, she commits a major crime. It is accepted that if the system of government is fundamentally just, however flawed it may be, there is a moral duty to comply with its laws. It is also recognized that even in a basically just system, an individual law may be so immoral that it is permissible or possibly obligatory not to comply with it. It is also possible that in such a system there are special circumstances in which it is permissible or obligatory not to comply with a moral law.

The duty generally to obey the law in a just system seems to fall under the heading of fidelity; by accepting the benefits of such a system, one becomes obligated to abide by its rules.<sup>27</sup> If one were free to violate the laws in a just system on less than very compelling grounds, the viability of the just system would be jeopardized.

The issue is, then, whether Physician would be morally justified to violate the law in order to assist Patient. I think not. The euthanasia circumstance does not seem to be a sufficient justification for the violation of law. Obviously there is room for disagreement.

Now a problem dealing with the pedestrian subject of the statute of limitations. Developer entered into a written contract with Contractor for the construction of an office building on land owned by Developer. Shortly before construction was to begin Contractor decided to enter another line of business and notified Developer that he wasn't going to perform. Developer was upset, told Contractor he would hold him liable for this breach, and

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27 For a discussion of this issue, including essays by John Rawls, Milton Konvitz, John Courtney Murray, Sidney Hook, and others, see *LAW AND PHILOSOPHY* 3-101 (S. Hook ed. 1964).

made other arrangements. Developer clearly has a contract action against Contractor. From time to time they discussed a settlement but never agreed on a figure. Negotiations broke down, time passed, and finally Developer contacted an attorney to bring suit. There was a three-year statute of limitations on contract claims; by the time Developer contacted an attorney three years and one month had elapsed from the time Contractor was to have begun construction. The attorney brought suit hoping that she could convince the trial judge to apply a theory akin to estoppel to defer the running of the statute because of the negotiations. In his pleadings Contractor admitted the validity of the contract and his breach, and pleaded the statute of limitations. The trial judge ruled in favor Contractor.

There are several moral issues to be examined. First, the morality of Contractor's use of the statute of limitations. Second, the morality of the statute itself. Third, the morality of Contractor's attorney in establishing a defense based on the statute. Fourth, the morality of the trial judge's participation in the resolution of the litigation.

There is little question that Contractor's use of the statute of limitations to avoid paying a claim based on his willful breach of contract is an immoral act. The refusal to compensate for the failure to keep one's promise is a continuation of the first immoral act. The fact that the law permits it does not make the conduct moral. There is much conduct permitted by law that is immoral. Contractor had the choice of paying the claim, as adjudicated by the court, or avoiding it by legal means, and he chose the latter.

Can a law be moral which can be used to achieve an immoral objective? The first amendment is just such a law. One can preach hatred of a racial or religious group, and indeed advocate genocide, with impunity. The statute of limitations is also such a law. The best reason for the statute is the protection it provides to the defendant who is not, or may not be, liable, but has difficulty establishing his defense because of the passage of time. His witnesses have forgotten, moved, or died, or his evidence is otherwise unavailable or difficult to obtain years after the event. There are also other considerations which justify the statute. Everyone shares an interest in resolving disputes soon after they occur so that people can go on with their affairs. A person who has a valid claim of a substantial nature usually brings suit without unusual delay. Everyone is on notice that delay will be penalized. These considerations outweigh the fact that bad people on occasion will

gain a wrongful advantage over people who are merely dilatory. The statute works unjustified harm sometimes, but on balance it is desirable to have a statute which establishes a deadline for bringing suit.

Then there is the issue of the participation of the lawyer in the accomplishment of the Contractor's immoral objective. The lawyer is not obligated to accept the case, but once she does, under the rules governing the profession she becomes committed to do what is necessary and lawful to accomplish the client's objective, without regard to moral or social consequences. Zealous and exclusive dedication to the client's interest within the law is the essence of the lawyer's role. Is it morally permissible for the lawyer to assist in the achievement of the client's immoral objective? Are the rules which govern the profession morally defensible in this respect? The moral philosophers disagree.

The position that the lawyer's conduct is morally defensible emphasizes the roles that are performed in the legal system and the autonomy of the client-citizen within the system. Legislators and judges have been granted the authority to determine what is legal and what is not, and the system of laws under which we live is fundamentally just, however flawed it may be. The citizen is entitled to know what he lawfully can and cannot do. The lawyer is the person to advise on such matters. If those who make the laws permit the citizen to do what is immoral, it is his legal right to do it. If it is his legal right to do it, he is entitled to the assistance of the lawyer to achieve it. If the lawyer declines to assist the citizen, the lawyer denies the citizen an aspect of his autonomy as a citizen. The participation of the lawyer in the immoral conduct of the client is justified by the fundamental rightness of the system and the differentiation of roles and responsibilities within that system.<sup>28</sup>

The moral philosophers who conclude that the amorality and unaccountability of lawyers is not defensible approach the issue differently. The lawyer who assists the client to achieve an immoral objective is directly engaged in immoral conduct. There is a duty to refrain from such conduct unless such conduct can be justified on other grounds of morality or social utility. The moral principle of the autonomy of the client does not extend to the

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28 See generally Fried, *The Lawyer as Friend: The Moral Foundations of The Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

invasion of the moral rights of others. The law may permit the client to do immoral acts, but that has no effect upon the immorality of the conduct. If the lawyer feels morally bound not to act, the client can undoubtedly find another lawyer who will not consider the conduct so offensive that she cannot bring herself to represent the client. If all available lawyers agree upon the immorality of the client's objective, and decline representation on that ground, the conduct is probably so vile that he should not be represented. The basically good system will not be damaged in any way by the unavailability of representation in this circumstance.<sup>29</sup>

It should be noted that some of the moral philosophers who oppose the amoral role of the lawyer are inclined to make an exception for criminal defense, for reasons that are beyond the scope of this discussion.<sup>30</sup>

What about the judge's participation in the immorality by her ruling in favor of Contractor after he pleads the statute of limitations? Certainly the judge assists in the achievement of the immoral objective. Her immoral conduct can certainly be justified. The legal system requires that the judge apply immoral laws, and moral laws which produce immorality in a specific circumstance. The judge has committed herself, has promised, to apply the law. If the judge chooses not to apply the law on moral grounds, she becomes a legislator. The consequences would be chaotic. The role of the judge requires that she act. The roles of the client and lawyer do not require them to engage in immorality. The judge has the immorality placed before her, and she cannot avoid it.<sup>31</sup>

There is an element of naivete in the discussion of the judge's role because most would agree that when faced with an immoral result the judge often has a degree of discretion in her

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29 See generally A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 112-37 (1980); D. LUBAN, *LAWYERS AND JUSTICE* 128-74 (1988); Donagan, *Justifying Legal Practice In The Adversary System*, in *THE GOOD LAWYER* 123 (D. Luban ed. 1983); Postema, *Moral Responsibility In Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

The lawyer whose client wishes to take action which is legal but, in the view of the lawyer, immoral, may engage the client in discussion of his objectives and their significance. Whatever predisposition the lawyer has with respect to participation in legal but immoral action, it seems that such discussion is required of the moral lawyer. This obligation is advocated by Professor Thomas Shaffer in his scholarly book, *ON BEING A CHRISTIAN AND A LAWYER* (1981). The first three chapters deal with the morality of role, the morality of withdrawal, and the obligation of moral conversation with the client.

30 See D. LUBAN, *supra* note 29 at 60-66, 145, 148; Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975).

31 See A. GOLDMAN, *supra* note 29, at 34-49.

findings of fact and application of law which will enable her to avoid the immoral result. Sometimes, however, that option is not available.

Let us turn now to the problem of the liability of the trustee for self-dealing. A wealthy person transferred assets to a trustee who was to pay the trust income to the transferor's son for his life, and upon his death, pay over the principal to son's descendants. The assets included corporate stocks, bonds, and a parcel of undeveloped land. The trust instrument authorized the trustee to retain the land but did not require her to do so. Unless the trust instrument provides otherwise, unimproved land is normally deemed to be an improper trust investment because it is not productive of income and its market value may be volatile due in part to the inefficiency of the market for land. The transferor died five years later. Two years after his death the trustee decided to sell the parcel of land because it was not appreciating in value and it was not producing income. The decision to sell was clearly proper. She placed it on the market for several months and received several offers, the highest of which was \$95,000. She had an appraisal made by an expert who valued the land at \$100,000.

The estimated market value at the time of the creation of the trust was \$90,000. The trustee, an investor in land, decided to buy the land from herself as trustee for \$100,000. The trustee had no secret information about the prospects for the land. She purchased because she believed in land as a long-term investment.

There is a rule in trust law that all transactions between the trustee and herself individually, regardless of fairness, are breaches of trust, and any beneficiary has an action to rescind the transaction. This is known as the "no further inquiry" rule. The lawyer who handled the land sale did not inform the trustee of this rule, but such failure to inform is not available as a defense to the breach.

Two years later, due to some new development plans near the land, its value shot up to \$150,000. The son learned of the sale by the trustee to herself and insisted that the land be returned to the trust in exchange for the \$100,000 paid plus interest on it.

First, there is the issue of the morality of the "no further inquiry" rule for self-dealing, which may penalize a trustee who has inflicted no damage on the trust. The rule is an implementation of the moral duty of fidelity. The trustee undertakes to serve exclusively the interests of the beneficiaries. It is difficult for an

individual to maintain her objectivity when her interests are involved. Whenever the trustee deals with herself, psychological forces are set in motion which are not favorable to the interests of the trust, even though the trustee may be capable of controlling those forces. The legal system has determined that it is better to prohibit all self-dealing than to allow self-dealing which can be proved to be fair. This rule may inflict damage upon a trustee who has not harmed the trust, but the rule is morally defensible because of the potential for advantage at the expense of the trust which may not always be consciously done. In addition, the informed trustee is on notice of the prohibition.

Is the trustee's conduct in this instance morally improper? She did not damage the trust. When she purchased the land it was as likely to decline in value as to rise. She was going to sell it in any event. There is, however, the argument that a trustee commits herself not to deal with herself. The law so provides, but in this case the trustee did not know of the rule. Nevertheless, a trustee probably senses that any transaction in which her interest is in conflict with that of the trust is tainted. It is hypothesized that the decision to sell was disinterested, but when a trustee purchases for herself there may be subconscious self-interest involved. It is plausible to maintain that this conduct is a breach of the duty of fidelity, but the matter is not clear.

Is the son as beneficiary morally entitled to enforce his claim against the trustee? The trustee may have committed a breach of the duty of fidelity, but the trust was not damaged. The trustee may not be without moral fault, but the liability is punitive. It is a close call, but my conclusion is that exercising one's legal rights in this situation is morally justified.

Another area of trust law that presents moral issues is the spendthrift trust. Testator dies leaving a will in which he disposes of his estate to Bank, as trustee, whose duty is to pay the income from the property to Testator's wife for her life, and upon her death, to distribute the trust property outright to Testator's children. The will also provides that the beneficial interests of the wife and the children cannot be transferred by them and are not subject to the claims of their creditors. The prohibition upon the voluntary and involuntary transfer of the beneficial interests makes this a so-called "spendthrift trust." In most states these constraints are valid, subject to several exceptions described below. Once the income or principal of the trust is paid to the beneficiary the creditors of the beneficiary can reach it and the benefi-

ciary can transfer it, but the beneficiary cannot transfer the right to future payments and creditors cannot reach such payments in the hands of the trustee. The purpose of the spendthrift trust is to assure the flow of benefits directly to the beneficiary.

The restraint upon voluntary transfer is not particularly objectionable, but the restraint upon creditors is. The spendthrift trust obstructs the creditor who seeks payment of his claim. It would be much simpler for the creditor to garnish the beneficiary's interest in the hands of the trustee.

In moral terms Testator is exercising his autonomy with respect to property in furtherance of his perceived duty of fidelity to his spouse and children. The acts of marriage and child-bearing carry obligations. Testator is providing for his family and also protecting them from their own improvidence. Autonomy and duty to family, however, do not permit a person to do injury to others. The impediment to creditors is such an injury. It is my conclusion that the Testator's use of the spendthrift provision, and the law which upholds it, are not morally defensible. In some states where spendthrift provisions are generally valid, the claims of children and spouses for alimony or support, as well as the claims of those who have provided "necessaries," have been excepted from the constraint. These exceptions evidence the moral reservations concerning the spendthrift trust.

The Uniform Premarital Agreement Act,<sup>32</sup> promulgated in 1983, is a proposed change in law which reflects a change in the values of society. Approximately one-third of the states have enacted it. The Act permits parties to a premarital agreement to contract with respect to: (1) their rights in the property of either or both of them; (2) the disposition of property upon separation, divorce, or death; (3) the modification or elimination of spousal support; and (4) any other matter, including personal rights and obligations, not in violation of public policy or a criminal statute. The contract is valid regardless of consideration. The Act expressly validates a premarital agreement even if it is unconscionable as long as the prospective spouse has knowledge of the other party's property or has signed a waiver of disclosure of such property prior to the execution of the agreement.

The Act has two protective provisions. If the agreement mod-

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32 9B U.L.A. 369 (1987). The text's discussion draws on §§ 2, 3, and 6 of the Act. For a list of the 16 states that have enacted the Act, see Table, UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 25 (Supp. 1991).



ifies or eliminates spousal support causing one party to become eligible for public assistance at the time of separation or marital dissolution, a court may require the other party to provide support to avoid eligibility, notwithstanding the terms of the agreement. Another provision states that the right of a child to support may not be adversely affected by the agreement.

Until recent years marriage was largely a matter of state-imposed status. Premarital contracts dealing with support and the consequences of divorce were unenforceable. Premarital contracts dealing with property interests of the spouses upon death, such as the surviving spouse's forced share and dower, were valid as long as the contract complied with certain criteria of fairness. Agreements dealing with support and the consequences of divorce entered into at the time of separation were valid provided certain fairness standards were met.

Marriage was considered the foundation of the moral society, and the state imposed the rules of the relationship. Contracts which would alter the rules were either forbidden or were required to meet a standard of fairness. The autonomy of the individual, specifically freedom to contract, was restricted in the interest of a fundamental societal good. In the case of the premarital agreement there was also a paternalistic element in the restriction of autonomy: the state was protecting a prospective spouse from making an imprudent decision affecting the remote future in circumstances where pressures were likely to exist.

In the past two decades, many courts have changed the law to allow premarital contracts dealing with the consequences of separation and divorce, provided they meet certain criteria of fairness. Premarital contracts dealing otherwise with support during marriage have remained unenforceable.

The traditional approach to marriage was that of a lifetime commitment of sharing, support, and raising of children, and the law reflected those values. The same sense of lifetime commitment and family is often lacking today among young couples. Often both spouses have careers whose importance competes with marital considerations. The divorce explosion has also made marriage often a middle-age, or post-middle-age, event where family is not an objective. I think it is a safe generalization that autonomy is valued more highly today in the marital context than it was in generations past.

It is not surprising, then, that the Uniform Premarital Agreement Act has had a reasonably warm reception in the several

years since its promulgation. Support, property disposition on divorce and death, and other things that may come to mind, are matters of contract without restraints of fairness. Sharing and support may be abolished by contract. The moral duty of fidelity has been subordinated to autonomy.

Let us now examine briefly freedom of speech under the first amendment. Certainly this furthers the moral objective of individual autonomy, specifically expression. Some protected expression may, however, be immoral. An extremist group, which advocates racism, religious hatred, and genocide, acts immorally because its speech is an effort to harm individuals without justification. Moral autonomy does not extend to the invasion of the moral rights of others. A societal judgment has been made, however, that it is better to afford protection to patently immoral speech of this socio-political nature than to draw lines with respect to what socio-political speech is permissible and what is not. Such line-drawing is undesirable because it could have a chilling effect on speech that society does not wish to inhibit, and it could lead to the proscription of unpopular speech which should not be proscribed. The first amendment protects immoral speech in order to preserve the moral exercise of autonomy.

Some of the issues that are presented in the examples have been treated very briefly and lend themselves to much more extensive analysis. The purpose of this Article is to introduce the reader to the basic content of morality, the method of applied morality, and the relevance of morality to law.

## VI. TWO SUBJECTS NOT DISCUSSED

(1) The moral analysis outlined in this Article assumes the existence of certain moral duties which serve to maintain the autonomy and dignity of the human being. Do these duties and values have universality, or are they merely a manifestation of our Western culture and its Judeo-Christian religious roots?

Certainly, different cultures have different moral positions. It does seem hard to believe, however, that any culture would find acceptable the infliction of harm without justification, the lying or breaking of promises without justification, or the unequal treatment of people who are in the same situation without justification. This may be what is meant by "self-evident." There is, however, the matter of the reasons which justify the deviations from these norms of conduct, which clearly vary from culture to cul-

ture, or over the years within the same culture.<sup>33</sup> In America we have treated blacks and women differently from others because race and gender were deemed to justify different treatment. This was accepted in good conscience by intelligent and just people in our society. It is not necessary to examine the culture of some primitive South American tribe to establish differences in moral outlook.

Whether or not our moral system has an element of universality, it is an humane system. We ignore it at our peril.

(2) This Article has dealt with what is called "normative ethics, namely . . . the basic principles, criteria, or standards by which we are to determine what we morally ought to do, what is morally right or wrong, and what our moral rights are."<sup>34</sup> This is the objective aspect of morality.

There is also a subjective aspect to moral conduct. A person who contributes to charity in order to improve his social standing in the community has done good for people but it does not reflect moral goodness in the person. A person who learned in law school, and believes, that when one makes a contract one always has the options of performing or breaching and paying damages, because no moral significance attaches to the promise, cannot be considered in a subjective sense to be acting immorally when he willfully breaches the contract and volunteers damages. A physician who lies to a terminally ill patient because he believes that telling the truth will harm the patient, whereas in fact his assessment was erroneous and the patient would have welcomed the truth in order to prepare himself psychologically and arrange his affairs, is not considered to have acted subjectively in an immoral manner.

The moral quality of the person is an important aspect of morality,<sup>35</sup> but it is beyond the scope of this Article. Our concern is with the characterization of the objective conduct, not the spirit that produced it.

### CONCLUSION

Morality, the sense of "right" and "wrong," seems to be a part of us, so it is inevitable that it plays a role in the legal resolution of human conflict. The study of moral norms and their ap-

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33 See S. ASCH, *SOCIAL PSYCHOLOGY* 377-79 (1952).

34 W. FRANKENA, *supra* note 13, at 61.

35 See generally *id.* at 62-71.

plication to situations of conflict should enable us as lawyers and members of society to use this most civilizing quality more effectively. We tend to make moral assessments without reflection; we should do better than that.

The fact that thinking people can arrive at different moral conclusions concerning conduct or conflict is not a reason for dismissing morality as a method of analysis. No matter what form of analysis is applied to human problems, informed people will come to different conclusions. One reason for this is that the analysis of human affairs necessarily is concerned with values.

If our understanding of law is to be informed, morality must be considered. Legal education has been remiss in this respect. It is my hope that this rudimentary exposition will help to demystify morality and its role in our legal system.

